No. 12337

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, THE CITY OF LOS ANGELES, a Municipal Corporation,

Appellants,

vs.

THE OKONITE-CALLENDER CABLE COMPANY, INCORPORATED,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.
Summary of Argument.

The question is simply the construction of an unambiguous contract. Appellee's brief makes the question appear too complex. The Court's function is to enforce the contract as made,—not create a new one. There is no ambiguity; so Appellee's aids in construction are improper. The Answer contains no admissions as claimed by Appellee. The suggestion of points advanced for the first time on appeal is incorrect. Appellee assumes ambiguity, overplays lead and copper, misconstrues terms, the index table, and Foster's testimony. Escalation on the group index is fair and allows for a profit. Assuming ambiguity, the Findings are clearly erroneous. Mr. Metz's testimony was erroneously admitted. Trial court's formula is incorrect and without support. Billing and payment on the group index binds Appellee. It was error to allow interest.

ARGUMENT.

II.

The Simple Question Presented Is the Construction of the Terms of an Unambiguous Contract and Is Not as Involved, Complex or Difficult as Appellee's Reply Brief Seems to Make It Appear.

(1) The Function of a Court Is to Enforce the Contract as Made and Not Create a New Contract by Inserting Words Not Used by the Parties.

A plain reading of the contract is the most important act to be performed by this Court. Appellee's Reply Brief continuously endeavors to evade this simple treatment of the case by arguing single words and phrases and small detailed bits of evidence which tends to confuse and hide the real issue. It might be termed an attempt to make capital out of a "hindsight hard-luck story," diverting attention from the real question, which is whether the contract is reasonably or fairly susceptible of different constructions. Appellee's argument might be stated to consist of contentions as to what the parties should have, could have or might have done, and not what they actually did do in executing this contract.

This Court is well familiar with the applicable rules for construction of the contract and so only a few cases and code sections will be noted.

The applicable code law to the question of interpretation presented here is found in California Civil Code Sections 1635, 1636, 1637, 1638, 1639, 1644 and 1645.

The rules in the chapter of the Civil Code where these sections are found are to be applied to ascertain the intention of the parties *if otherwise doubtful.* The language governs interpretation if clear and explicit and *does not involve an absurdity.* The intention is to be ascertained from the writing alone, *if possible.*

On pages 1 to 3 of the Appendix to this brief are cited several decisions by this and other courts, with a statement of the rule of construction announced.

(2) Where There Is No Ambiguity in the Contract, It Must Speak for Itself.

In Appellants' Opening Brief (pp. 13 to 20) cases are cited holding that the District Court's Findings may be set aside where clearly erroneous, and it is a question of law for this Court to determine whether any uncertainty or ambiguity exists in the contract.

Additional cases in point on the proper interpretation of a contract are cited and digested on pages 1 to 3 of the Appendix to this brief under II.

Throughout appellee's brief the position is taken, without expressly so stating, that it is proper to explain this contract "by reference to the circumstances under which it was made and the matter to which it relates," as provided in California Civil Code Section 1647. The rule in California is that Section 1647 of the Civil Code and Sections 1856 and 1860 of the Code of Civil Procedure can be invoked only to explain an ambiguity, which appears upon the face of the contract itself, by reference to the circumstances under which it was made and the matter to which it relates.

The first point to be determined is whether an ambiguity is found in the language and whether the trial court erred in receiving parol evidence in respect to the construction. There is no ambiguity. It was error to receive parol evidence.

Barnhart Aircraft, Inc. v. Preston (1931), 212 Cal. 19, 21, 22-24.

The code sections are but an enactment of the common law rule. It is never within their contemplation that a written contract shall have anything added to it or taken away from it by evidence of "surrounding circumstances." The rule of evidence is invoked and employed only where, on the face of the contract itself, there is doubt and evidence is used to dispel that doubt, not by showing that

the parties meant *something other than what they said,* but by showing what they meant *by what they said.*

United Iron Works v. Outer Harbor Dock and Wharf Company (1914), 168 Cal. 81, 84.

In *Johnson v. Pugh* (1901, Wisconsin), 85 N. W. 641, it was contended that evidence of circumstances surrounding and leading up to the making of a written contract is always admissible, not for the purpose of changing or varying the terms, but for the purpose of putting the court in possession of the circumstances of the parties at the time of contracting. This is answered emphatically at page 642:

> "Not so! Where there is no ambiguity in the contract, either in its literal sense or when it is applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters."

Of the cases cited the Wisconsin court says that they come down finally to the simple proposition that where there is no uncertainty of sense, there is no room for construction. The *Johnson* case was cited and quoted with approval in *Peterson v. Chaix* (1907), 5 Cal. App. 525, 531.

Under the foregoing authorities the contract must speak for itself, entirely unaided by extrinsic matters, where there is no ambiguity. It must appear incomplete on its face before parol evidence is admissible to complete it, and then such evidence must be consistent with and not contradictory of the contract.

The foregoing cases demonstrate that Specification of Error No. 4 was correctly taken. The court erred in admitting the specified portions of Mr. Metz's testimony. (App. Op. Br. pp. 6 to 10.)

Appellants submit the real question is as presented under the foregoing authorities,—not as stated by appellee. Under the authorities presented appellee's statement of the basic question is incorrect.

III.

Appellants Have Never Admitted That the Use of the Index of Wholesale Prices of Lead and Copper Was Correct or That They Should Be Treated Equally.

Appellants Answer [T. of R. pp. 15-18, par. IV] definitely put in issue appellee's allegation as to the "monthly index figures referred to in said contract and compiled by the United States Department of Labor." [T. of R. pp. 5 and 6, par. IX.]

The Answer admits and alleges that the group index showed an increase in material costs and the Department of Labor publication of the index of wholesale prices as shown by Plaintiff's Exhibit 1, and the groups, subgroups and the index numbers for lead and copper. The Answer further alleged a computation by which the lead and copper indexes were averaged to obtain the amount of increases alleged by plaintiff. The Answer then denied all of Paragraph IX of the Complaint not expressly admitted. This was a denial that the *monthly index figures referred to in the contract* increased except as the group index increased. The Answer denies the formula or that the proper index figures were used, but admits the arithmetic. That is all. It was done to expose plaintiff's error in using lead and copper indexes and averaging them. A careful reading of the pleadings by appellee would have avoided any conclusion of such an admission by appellants. The claim is without merit. It is not an alternative for the court, though the computation in the Answer is correct but not the formula.

The impropriety of plaintiff's theory and formula adopted by the court is demonstrated by the argument in appellants' brief (pp. 39-43) under the heading "6. If the Contract Does Not Provide for Price Adjustment Based Upon the Group Index, There Is No Contract for Price Adjustment." There is no evidence whatsoever to show or support the computation required under plaintiff's theory and adopted by the court.

IV.

The Suggestion in Appellee's "Statement of the Case" of Certain Points Advanced for the First Time on This Appeal Is Incorrect.

Appellee's "STATEMENT OF THE CASE" (Reply Brief pp. 7-11) says appellee wishes to make certain additional statements "which have a bearing upon certain points advanced for the first time on this appeal by appellants. * * *" Appellee's reference to the pre-trial memoranda and the quotations therefrom merely show that the question on this appeal was presented in the trial court, namely, "the correct interpretation of the Price Adjustment Clause."

Appellants are at a loss to determine the import of appellee's reference to appellants' objections to the findings unless it is to suggest that appellants have refrained from presenting matters which were presented to the trial court. These objections, if in the record, would further demonstrate to this Court that the points advanced in the trial court are the ones advanced here.

> "There were included in the record proposed findings and objections thereto. This was improper. Federal Rules of Civil Procedure, rules 52(a), 75(e), 27 U. S. C. A. following section 723c. * * *"
>
> *U. S. v. Forness* (2 Cir., 1942), 125 F. 2d 928 at 942.

Also it would have unnecessarily increased the cost of this appeal.

These objections referred to Defendants' Exhibits B and C in evidence, and argued that the cost of lead and copper in the materials was unequal and varied considerably as to the various items or types of cable; that there is no method set forth in the Findings for relating the percentage of increases to the contract price to arrive at the amount of the recovery stated because there is no formula for using the index figures for lead and copper from which any percentage could be obtained.

Appellee's "STATEMENT OF THE CASE" adds nothing and its suggestion here of the foregoing "points advanced for the first time on this appeal by appellants" is baseless.

V.

Appellee's Argument Assumes the Contract Is Ambiguous and Overemphasizes the Subject Matter, Misconstrues Its Terms, the Department of Labor Data, and Mr. Foster's Testimony.

(1) Subject-matter of the Contract.

The Price Adjustment Clause was drawn to cover any material purchased under the contract, and had been used since 1941 for the purchase of various types of equipment and materials. [T. of R. pp. 135-142.] This court should not be misled by the fact that the only metals used in making the cable were lead and copper, or that copper and lead cost 90 per cent of the cost of all material used in the cable. Here, again, appellee brings up its claim of admissions in appellants' answer. This has been covered under Point III, *supra,* in this brief. (App. Rep. Br. p. 15.)

Appellee argues that in view of the circumstances, it would be "unusual," to say the least, that parties should contract for the use of index of wholesale prices for metals and metal products group.

> "The fact that the construction placed upon the contract makes it an *unusual* one is immaterial. Parties are not bound to enter into the *usual* contracts and there is no legal presumption that they will do so." (Italics supplied.)
>
> *Holman v. Musser* (1922), 59 Cal. App. 734, 738.

Appellee then makes a speculative argument that the use of the group index would be speculative and entirely unreasonable, citing one commodity which decreased in price while the group index increased.

The contract should be read and understood without regard to the materials being purchased. While the use of the group index might, as judged now with the aid of "hindsight," make the contract unreasonable as to appellee, it is made reasonable in price as to appellants.

In construing the contract in question it must be borne in mind that nearly every business venture entails some assumption of risk, some element of gambling.

Transportation Guarantee Company, Ltd. v. Jellins (1946), 29 Cal. 2d 242 at 248.

Appellee's attempt to ridicule the use of the group index cannot change the meaning of the plain words of the Price Adjustment Clause.

(2) The Terms and Provisions of the Price Adjustment Clause and the Department of Labor Data.

Appellants' brief (pp. 25 to 43) deals with the terms and provisions of the Price Adjustment Clause, and we submit fully demonstrates that the parties intended the use of the group index.

Appellee in its brief (pp. 17 to 25) picks out words, phrases and parts of phrases from the clause to support its contention, straining and twisting at the language of the clause until it breaks. Appellants' answer to this is a plain, simple reading of the unambiguous clause without reference to the subject-matter or to circumstances, or the use of "hindsight."

Appellee's argument regarding the use of the terms "material," "material costs" and "increases in material costs," is an attempt to make the contract say what it does not say. Whether the clause is artfully drawn or not, as appellee states, "its meaning is clear." (Appellee's Reply Brief, p. 18.) There is a "Metals and Metal Products" group. It is the sixth group and the Roman numeral conveys the same meaning generally to all as the Arabic numeral or as the word "sixth." This is absolutely clear.

On page 19 of its brief, appellee says "it should be noted that before the quoted words 'Group VI—Metals and Metal Products,' the words 'wholesale prices' appear, but there are *no* wholesale *prices* given for Metals and Metal Products as a group." This is misleading. Instead

of the two words "wholesale prices," the four words "index of wholesale prices" appear before the phrase "Group VI—Metals and Metal Products." Price adjustment is to be based upon the *index of wholesale prices*—not upon *wholesale prices.*

Next, appellee attempts to make capital out of the use of the phrase "the average of monthly material index figures," as being inconsistent with a group as a whole. The plural "figures" is used because there is more than one month in the contract period and the average of the monthly figures is to be taken. The index of wholesale prices for the group for any month is a figure, and there are more months than one. The index of wholesale prices is the material index figure.

Having mentioned "Metals and Metal Products" once, it certainly was not necessary to continuously repeat the term to anyone familiar with the Department of Labor indices. It was proper to continue to refer to the monthly material index figure. Once the clause takes the reader to the group index, that is sufficient.

On page 20 of its brief appellee makes several concessions for appellants. The first, regarding Mr. Foster's testimony, is not a concession made by appellants but a summarization of his testimony at page 35 of their brief. Appellants are not bound to concede that they are obliged to give up prefix "Group VI." The prefix "Group VI" has a clear meaning. It is used in the contract and should be given its usual, common meaning, rather than be stricken from the contract.

There is no evidence in the record to show that there is or is not any other grouping of commodities similar to the "Metals and Metal Products" group. There are many indexes published by the Bureau of Labor Statistics and by others which might well be agreed upon as a substitute. At the most the clause was a contract to agree upon a substitute index.

Appellee argues that the parties should not have contracted for a clause providing for escalation upon the index for a group which contained manufactured products. This is exactly what they did. This is an argument as to what they should not have done rather than what they did. The remaining portion of page 22 is devoted to arguing possibilities and what might have been.

This contract shows that the appellants were not "playing roulette" but were safeguarding themselves against increasing costs during the period involved.

Appellants' Opening Brief (pp. 25-34) completely answers appellee's argument as to the meaning of the term "group" and the index of wholesale prices, compiled monthly by the U. S. Department of Labor, and whether "Metals and Metal Products" is the sixth group and the one set forth in the contract.

Appellee's Reply Brief (pp. 24 and 25) fails to answer appellants' argument (Appellants' Opening Brief, pp. 37-39) that the Price Adjustment Clause was not intended to achieve complete accuracy in the adjustment of prices. The formula was not intended to be drafted with that degree of refinement which would correspond to the actual facts.

Appellee's Reply Brief on pages 29 to 32 quotes excerpts from the testimony of Mr. Foster. All his testimony is summarized on pages 35 and 36 of Appellants' Opening Brief and appears on pages 135 to 142 of the Transcript of Record. We submit that his testimony must be considered as a whole and that the inferences attempted to be drawn by appellee are unreasonable.

Appellee actually argues that the contract means that the group was designated by the contract as "an *appropriate place* under which to find changes in price of a good many articles which the Department was purchasing." This is saying that whether the contract was for lead-covered cable, steam turbine electric generators, oil circuit

breakers, metal enclosed switch gear or other types of machinery, the clause was used to show the appropriate "city" in which the "persons" could be found without expressly stating their correct addresses by number and street in the "city." Obviously, we submit, this was not the case here. Accurate draftsmanship and terminology were used throughout the clause. The adjustment for labor increases was to be based on the lowest possible division in a particular index and it was expressly named. It corresponded to a single commodity in the wholesale price index. It was a subdivision of a larger group which was one of several groups making up the entire table. In the case of materials, it was not intended to go beyond one of the major divisions of the table.

(3) Mr. Foster's Testimony.

At page 32 of Appellee's Reply Brief it is stated that the words "many groups" in a question addressed to Mr. Foster make it confusing. Appellants submit that this is a mistake in the transcript and that the word used must have been "commodities," which would conform to the question which followed. The two questions and his answers definitely state that he had in mind that the component figure for many commodities was a more conservative figure on which to adjust the price than the individual commodity.

VI.

Appellants' Construction Makes the Contract Fair, Reasonable and Just and Allows for a Substantial Profit.

A plausible argument can be made that under the evidence about $7,500 out of the unescalated 30% or $27,-328 of the total of $96,694 must include some profit; so that appellee can't be losing money on this deal. Appellee's Reply Brief at page 24 omits any mention of *profit* in the 30%.

None of the cases cited (App. Rep. Br. pp. 33-37) are in point.

Two of the cases show that the two constructions must be "equally consistent with the language," which is not true here.

Another case says the rational and probable construction will be preferred "where an agreement is fairly susceptible of two constructions."

Another case says *if without doing violence to its terms* the contract is capable of a different construction which is more in accordance with justice and fair dealing, that would be adopted.

More in point is a statement in *Francisco v. Schleischer* (1920), 50 Cal. App. 670, 675, which may well serve to answer appellee's contentions:

> "It is urged that such construction makes the undertaking of the defendant quite unreasonable, but it ought not to be necessary to observe that many persons enter into unreasonable contracts, and it is no function of the courts to relieve them from the effects of their foolishness."

VII.

Assuming the Contract Is Not Clear, There Is No Conflict in the Evidence and the Findings Are Clearly Erroneous and Should Be Set Aside.

Appellants' Opening Brief (pp. 13 to 16) cites Rule 52a of the Federal Rules of Civil Procedure and decisions holding that in an action tried without a jury, where findings are clearly erroneous, they may be set aside on appeal by this Court.

Another case to the same effect is *Daitz Flying Corporation v. U. S.* (2nd Cir., April 7, 1948), 167 F. 2d 369, 371. There the facts were held not debatable and a finding inconsistent with such facts was held clearly

erroneous, even though a witness had made "pitiful attempts upon the stand to put another meaning upon his report. * * *"

The cases cited in Appellee's Reply Brief (pp. 38 to 42) do not hold to any different rule than that contended for by appellants.

The reviewing court has power to reverse the judgment when it is left with a definite and firm conviction that a mistake has been committed and therefore the finding is clearly erroneous.

> *United States v. U. S. Gypsum Co.* (March, 1948), 333 U. S. 364, at 394, 395.

The case of *United States v. Yellow Cab Co.*, 70 S. Ct. 177 (Advance Sheets, decided December 5, 1949), 94 L. Ed. 3, was not a contract case, but a conflict in the evidence by nine witnesses, 485 exhibits, and defendant's witnesses.

The remaining cases cited by appellee on pages 42 and 43 of its brief are not in point. They deal with cases tried upon an agreed statement of facts, with ambiguous contracts, doubtful language, conduct of the parties supporting the trial court's interpretation, and where the judgment is based upon conflicting evidence. They have no applicability to the case at bar, where there is no conflict whatsoever in the evidence.

Although appellee argues that the trial court could draw all reasonable inferences that it felt proper from the Price Adjustment Clause, as well as all reasonable inferences from the testimony of witnesses, it practically admits that if the trial court was clearly in error in these respects, the judgment should be reversed. We submit that the trial court was in error and the judgment should be reversed.

VIII.

The Errors in Admitting Mr. Metz's Testimony Were Inconsistent With Substantial Justice.

Errors of the trial court in admitting Mr. Metz's testimony set forth in Specification of Error No. 4 (pp. 6 to 10) in Appellants' Opening Brief and argued under V, Argument, 3 (pp. 22 to 25) are commented on in Appellee's Reply Brief (pp. 43 to 45). Although it may so appear in the Transcript of Record, appellee is incorrect in saying that appellants' counsel answered the court's question about the insulating material in the cable. Mr. Metz was on the stand and answered the court's question "What is that solid matter in the center?" by saying "That is paper and insulation."

The contract was not ambiguous, so the court erred in admitting his testimony over proper and timely objection. This is so held by three cases cited and quoted from, *supra,* in this brief:

Barnhart Aircraft, Inc. v. Preston (1931), 212 Cal. 19, 21, 22-24;

United Iron Works v. Outer Harbor Dock and Wharf Company (1914), 168 Cal. 81, 84;

Peterson v. Chaix (1907), 5 Cal. App. 525, 531.

Defendants' Exhibits B and C and Mr. Gray's testimony [T. of R. pp. 146 to 150] were introduced by appellants to prove the variations in weight and cost of lead and copper in this contract and in each of the six types of cable. The lack of basis in fact for treating lead and copper on a 1 to 1 basis is fully argued and demonstrated in Appellants' Opening Brief at pages 39 to 43 (V, Argument, 6).

Exhibit C shows that at one extreme the ratio was copper 1 : lead 0.73. At the other extreme the ratio was copper 1 : lead 9.05,—not a ratio of 1 : 1, as used by the court in making its Findings as to the amount of the judgment.

IX.

The Formula Upon Which the Trial Court Computed the Amount of the Judgment Is Incorrect and Is Not Supported by the Evidence.

Appellee's Reply Brief on pages 46 to 48 attempts to justify the trial court's formula. Here, again, is an attempt to rewrite the contract of the parties or to make the word "average" perform double duty. Appellants' Opening Brief (pp. 20, 21) quotes a portion of the Price Adjustment Clause and demonstrates by striking out and underlining the words stricken and added so that the paragraph would contain the wording necessary to support the trial court's finding. Now appellee argues the word "average" "may reasonably be interpreted to include the average of the copper and lead figures as well as using such average in computing the percentage of increase in addition to the average over the months in question." This requires that the word "average" be given a new definition to mean "average of the average." The clause says that the "average of the monthly material index figures * * * will be computed * * *." There was an index figure for more than one month, so the clause properly uses the phrase "material index figures" for the period. This is indeed straining at a word which is present once but which to support the trial court's finding must be found twice. To support the Findings requires a clause adding more words.

Contrary to appellee's statement on page 46, "the question of method of computation was" *always* in issue, as has been previously argued and demonstrated in this brief. The mathematics are correct. The formula used is wrong. Lead and copper figures are incorrectly used and they are incorrectly given equal weight. Appellants never told the trial court at any time that they conceded that if lead and copper figures were to be used, the plaintiff was entitled to recover the amount of the judgment. Appellants introduced evidence at the trial of the action proving, and argued on the trial of the action and upon the hearing of appellants' motion for new trial, that there was no basis

in fact for treating lead and copper equally by averaging the lead and copper index figures. The trial court was wrong in two instances: (1) in using lead and copper index figures, and (2) in averaging or assigning equal weight to the index figures. It is to the detriment of these appellants if a judgment is entered against them which has no support in the evidence. The computations in appellee's brief cannot supply the lack of evidence to support the judgment. The theory of the court was clearly erroneous and its Findings of Fact and Judgment based thereon likewise clearly erroneous.

X.

Appellee Is Bound by Its Sending of the Six Invoices Computing Escalation on the Group Index.

Neither Mr. Metz nor Appellee's Reply Brief (pp. 48, 49) successfully explain away the sending of these invoices. These were invoices of his company in the course of business and paid in the same manner. [T. of R. pp. 129, 130.] Mr. Metz was Vice President, Treasurer and Chief Executive Officer of appellee. [T. of R. p. 132.]

In *Nevin v. Mercer Casualty Co.* (1936), 12 Cal. App. 2d 222, the court says "It necessarily follows that the authority of the person sending the letter was thus admitted." Likewise, it follows that the authority of the sender of the invoices was admitted by the company.

XI.

Appellee Cannot Recover Interest Prior to Judgment In This Action.

None of the cases cited by appellee in its argument for the allowance of interest *involves a question of interest.* The cases cited discuss the question of whether in tort actions arising out of proprietary functions, a municipality is liable for negligence like individuals or private corporations, whether the doctrine of estoppel may be invoked on behalf of or against a municipality, and whether a Nebraska statute limiting the amount of tax levies and bond issues also limits the power of a Nebraska munici-

pality to contract for a plant costing in excess of the limitation.

We are not here concerned with such questions. The question is whether in an action against a municipality, interest may be recovered prior to judgment in the absence of express statutory authority or contract therefor. On this question appellee has cited no cases in point.

Likewise, the quotation from 18 California Jurisprudence, Paragraph 272 on page 53 of Appellee's Reply Brief is not in point. In the footnote to the quotation is found the case of *Brown v. Town of Sebastopol* (1908), 153 Cal. 704, 96 Pac. 363, also cited by appellee, holding that a municipal corporation may invoke the doctrine of estoppel in its favor. This is the law, but it has no application to the question of allowance of interest.

The relevant quotation from Paragraph 272 of 18 California Jurisprudence would be that contained on pages 998 and 999:

> "The making of contracts by municipal corporations is, in general, governed by their charters. When a freeholders' charter contains a complete scheme upon the subject, it will control over general laws."

18 California Jurisprudence, Paragraph 365, page 1120, should also be quoted:

> "A municipal corporation cannot be held to the payment of interest on its debts unless so required by a statute or by a lawful contract."

Also, the quotation from McQuillin on Municipal Corporations on page 54 of Appellee's Reply Brief is not in point. It is taken from a general historical section and is wholly without any citation of authority.

The relevant quotation from McQuillin would be that contained in Volume 5, Paragraph 2099, page 529, Second Revised Edition, in the chapter discussing payment for public improvements in the paragraph entitled "Interest on Sums Due," which states:

> "Whether the contractor is entitled to interest on money due him but unpaid depends upon the statutory or charter provisions relative thereto and also on the

terms of the contract under which the work was done."

and cites, among other cases, the case of *Powell v. The City of Los Angeles* (1928), 95 Cal. App. 151, 272 Pac. 336.

The quotation from Sutherland on Damages, as to that author's opinion in 1916 of what the law should be, is not supported by citation of any cases, and of course cannot be relied upon to overrule what the law has been declared to be.

Appellee is in error in urging that Section 16051 of the Government Code of the State of California, as enacted in 1945, changed the rule with respect to the allowance of interest. First, it is to be noted that Section 16051 is a part of the law of claims against the State of California, and is not applicable to claims against appellants. Secondly, it was not a new enactment in 1945. Substantially the same language as that quoted on page 55 of Appellee's Reply Brief has been in effect for 57 years. Section 5 of "An Act to authorize suits against the State, and regulating the procedure therein" (Stats. 1893, Ch. 45) was in effect until 1929, when it was repealed and re-enacted as a part of Political Code Section 688 (Stats. 1929, Ch. 516). Political Code Section 688 was in effect until 1945, when it was repealed and re-enacted as Government Code Section 16051. (Stats. 1945, Ch. 119.)

We submit that appellee's argument merely confuses the issue. It is necessary to return to certain fundamentals:

1. The California cases uniformly hold that a municipal corporation cannot be held to the payment of interest on its debts unless so required by contract or by statute.

2. The contract herein does not provide for interest.

3. No applicable statute provides for interest.

(a) The Government Code sections on the law of claims against the State of California (of which Section 16051 is a part) are not applicable to appellants.

(b) The Charter of The City of Los Angeles (Article XXVIII) is applicable on the law of claims against appellants.

(c) Said Charter provides but a single system for claims against appellants, whether they are exercising governmental or proprietary functions. See *Continental Insurance Company v. City of Los Angeles* (1928), 92 Cal. App. 585, 268 Pac. 920, requiring compliance with the Charter in making claims arising out of proprietary functions of appellants.

(d) Said Charter does not provide for the payment of interest.

Appellee quotes broad language employed in cases with reference to entirely different circumstances, and in so doing, has fallen into the same error pointed out in *City of Los Angeles v. Los Angeles Building and Construction Trades Council* (Oct., 1949), 94 A. C. A. 34 (Petition for hearing in the Supreme Court denied Dec. 5, 1949). It was contended that when a city was acting in a proprietary capacity, the city was subject to the same obligations and liabilities as a private employer, and accordingly the availability to it of injunctive relief against strikes and picketing was the same as that of a private employer. The court pointed out that distinctions between governmental and proprietary functions of a city arose out of tort liability. It refused to apply such distinctions to a case where the charter created a single civil service system governing all positions in the city's service, regardless of whether they involved an exercise of governmental or proprietary functions. (At pp. 3-5 of the Appendix to this brief will be found a quotation of the court's language on this point.)

Likewise in this case no legitimate reason can be found for drawing any distinction between the governmental and proprietary functions of the City. A single system governs claims against the City, regardless of whether they involve an exercise of governmental or proprietary func-

tions. If the courts were to say that the provisions of the Charter concerning claims relate to the exercise of governmental functions but not to proprietary functions, that would be judicial legislation.

The rule with respect to allowance of interest set forth in Appellants' Opening Brief (p. 46) is so well settled that appellants deemed it unnecessary to cite further authority in their Opening Brief. However, the cases listed on page 5 of the Appendix to this brief, could also have been cited in accord with the rule in the *Ingebretson* case.

We submit that Appellee's claim for interest is wholly erroneous and against all authority, and that therefore the amount of the interest prior to judgment, $1,306.21, should be stricken from the Findings, Conclusions of Law and the Judgment.

Conclusion.

For the reasons and arguments advanced in our Opening Brief and in this brief, appellants respectfully submit that interest prior to judgment cannot be recovered in this action; that the judgment of the District Court is clearly erroneous; that the judgment in this case should be reversed and the case remanded with directions to the District Court to enter judgment in favor of appellants that the plaintiff and appellee take nothing.

Respectfully submitted,

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APPENDIX.

II.

"Rules for Construction of a Contract" (See II. of Argument).

Contracts are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in a plain, ordinary and popular sense.

> *Imperial Fire Ins. Co. v. County of Coos* (1894), 151 U. S. 452 at 463, 38 L. Ed. 231, 235.

Courts are without power to modify contracts or to distort the plain meaning of the language used by the parties to them.

> *Transcontinental and Western Air v. Parker* (Eighth Circuit, 1944), 144 F. 2d 735, 736.

This Court has held that where the terms of the contract can be rendered by taking it by the four corners and viewing it as a whole, that manner of interpretation is most satisfactory and should be adopted.

> *Lesamis v. Greenberg* (Ninth Circuit, 1915), 225 Fed. 449.

It is not within the province of a court to redraft a contract which the parties have executed.

> *Carlsen v. Security Trust & Savings Bank* (1928), 205 Cal. 302, 307;
>
> 12 American Jurisprudence, Contracts, §228;
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> 17 Corpus Juris Secundum, Contracts, §296, pages 702-707;
>
> 6 California Jurisprudence, 326, Contracts, §192.

If a contract is not ambiguous, no construction is allowable. A court will not resort to construction when the intent is expressed in clear and unambiguous language.

Ucovich v. Basile, Jr. (1938), 26 Cal. App. 2d 272, 277.

Whether the language is ambiguous or not is a question of law. A request for construction assumes that the language is ambiguous; otherwise construction could not be resorted to.

Golden Gate Bridge & Highway Dist. of California v. United States (Ninth Circuit, 1942), 125 F. 2d 872 at 875, certiorari denied, 316 U. S. 700, 62 S. Ct. 1298, 86 L. Ed. 1769.

Where the contract contains no ambiguity or uncertainty in its terms, its construction must be derived solely from the language within its borders. The reviewing court is not bound by the decision of the trial court made either without the aid of evidence or where there is no conflict in the evidence.

Layne-Wells v. Schlumberger Well Surveying Corp. (1944), 65 Cal. App. 2d 180, 184.

"The principal problem presented on this appeal consists of a determination of whether or not the language of the contract is sufficiently certain and definite to render unnecessary a resort to extraneous evidence respecting the circumstances surrounding the execution of the instrument, the situation of the parties, and their intention in executing it."

Universal Sales Corp. v. California Press Mfg. Co. (1942), 20 Cal. 2d 751 at 760.

"The first rule respecting the interpretation of contracts is that we may not apply one of those well-

recognized rules as an aid in its construction until we shall first be satisfied that the language is fairly susceptible of two different interpretations—in other words, we cannot and should not attempt to wrench the language from its ordinary meaning."

Beaumon v. Kittle Manufacturing Co. (1932), 122 Cal. App. 547, 549.

(In Appellants' Opening Brief at page 18, through error a portion of the above-quoted language was incorrectly attributed to *Universal Sales Corp. v. California Press Manufacturing Co., supra.*)

XI.

"Re Interest Prior to Judgment" (See XI of Argument).

". . . We need not decide whether, in view of the fact that water and electricity are used by both public and private consumers, the department is acting solely in a proprietary capacity (compare *City of Huntingburg* [*Huntington*] *v. Morgen,* 90 Ind. App. 573 [162 N. E. 255, 257], and *Eastern Illinois State Normal School v. City of Charleston,* 271 Ill. 602 [111 N. E. 573, 575], with *Christian v. City of New London,* 234 Wis. 123 [290 N. W. 621, 623]; see, also, *Brush v. Commissioner of Int. Revenue,* 300 U. S. 352, 370-371 [57 S. Ct. 495, 81 L. Ed. 691, 108 A. L. R. 1428]), for we are of the opinion that no legitimate reason can be found for drawing any distinction, within the framework of the present case, between the governmental and proprietary functions of the city. The distinction was developed by the courts for application chiefly in cases involv-

ing the tort liability of municipal corporations, 'to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations.' (*Trenton v. New Jersey,* 262 U. S. 182, 192 [43 S. Ct. 534, 67 L. Ed. 937].) It has no rational application in the present situation. The city, having been lawfully empowered by its charter to furnish water and electricity to its inhabitants, is thereby performing a municipal and public function, irrespective of whether it is acting in a 'proprietary' or 'governmental' capacity. (*Irish v. Hahn,* 208 Cal. 339, 344 [281 P. 385, 66 A. L. R. 1382].) A single civil service system governs all classified positions in the city's service, regardless of whether they involve an exercise of governmental or proprietary functions. Manifestly, all of the city's classified employees, regardless of function performed, must be considered upon the same basis. The legal principles governing the city's obligations respecting the working conditions of water and power employees can be no different from those pertaining to any other employees. A contention similar to that made here was squarely rejected by this court in *Nutter v. City of Santa Monica,* 74 Cal. App. 2d 292, 302 [168 P. 2d 741], in treating of the duty of a municipality to bargain collectively with a union of city bus line employees. . . ."

City of Los Angeles v. Los Angeles Building and Construction Trades Council (Oct., 1949), 94 A. C. A. 34, 43-44; 210 P. 2d 305, 311.

"Additional Cases in Accord With *Ingebretson* Case."

Savings and Loan Society v. City and County of San Francisco (1901), 131 Cal. 356, 63 Pac. 665;

Columbia Savings Bank v. County of Los Angeles (1902), 137 Cal. 467, 70 Pac. 308;

Miller v. County of Kern (1907), 150 Cal. 797, 90 Pac. 119;

Spencer v. The City of Los Angeles (1919), 180 Cal. 103, 179 Pac. 163;

Powell v. The City of Los Angeles (1928), 95 Cal. App. 151, 272 Pac. 336;

Los Angeles Rock & Gravel Co. v. The City of Los Angeles (1933), 132 Cal. App. 262, 22 P. 2d 541.